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INDIAN CLAIMS IN THE BEDS OF OKLAHOMA WATERCOURSES

Michael M. Gibson*

Introduction

Forced to cede their vast domains east of the Mississippi River, the Five Civilized Tribes were ordered to settle in perhaps the least desirable part of the Louisiana Purchase. Because of their power and sophistication, the five tribes received what no other tribe would receive again from the government—a grant in fee simple.¹ As settlers occupied the remaining parts of the national territory, the five tribes were again forced to cede part of their holdings to allow settlement of the Indians displaced by expansion. The Civil War brought the final cession; the five tribes were punished for siding with the South.² Considered together in 1837, the five tribes had title to what is now the entire state of Oklahoma, excepting the Panhandle. In 1866, this had been cut back to roughly the eastern half of Oklahoma. Still unsatisfied with the tribes' progress in achieving "civilization," the federal government decided to break up the tribal ownership into allotments in severalty to each tribal member. This was accomplished in the late nineteenth and early twentieth centuries.³ For the most part, the land that was not allotted to individual tribal members was sold; a few small parcels were left as tribal land.

The other Indians of the state were settled on reservations, created by the cession of land by the five tribes. With the single exception of the Osages, the federal government was ceded land by the five tribes, and it in turn gave reservations to the "wild tribes." The Osages were given a direct equitable grant in 1872⁴ by the Cherokees because it was originally Osage land on which the Cherokees settled.

The status of property rights of Indians on reservations is something more than the "aboriginal Indian title of use and occupancy," but something less than a fee simple. These Indians were also given allotments, either under the General Allotment Act⁵ or the special acts for the Sac and Fox,⁶ the Miamis, and the Peorias.⁷ Most of the surplus reservation land which was not allotted was sold; however, land neither sold nor allotted was held "in trust" by the federal government for these tribes. Land held in trust is of the identical quantum of interest as reservation land.⁸

It is against this background that Indian claims to the beds of watercourses in Oklahoma must be analyzed. The five tribes have

* B.A. 1972, Oklahoma; J.D. 1975, Oklahoma.

fee simple claims; the general allotment Indians (including the Sac and Fox, Miamis, and Peorias) have "Indian reservation" claims.

The Arkansas River Cases

As a general rule, upon a territory's admission to statehood, the state acquires portions of the public lands. Included in the public lands are navigable rivers, subject to the navigation servitude of the federal government. As a general rule, the beds of nonnavigable watercourses are owned by the adjoining riparian owners to the middle of the watercourse. Exceptions do occur which render these general rules nugatory; as with so many other areas of the law, Indians tend to be the exception.

The landmark case is *Brewer-Elliott Oil & Gas Co. v. United States*.⁹ The state of Oklahoma had executed oil and gas leases on part of the Arkansas River bed above its junction with Grand River, opposite Osage County. The federal government, as trustee for the Osages, sued for an injunction against further exploration and drilling and to quiet title, grounding the claim of the Osages on the fact that, as owner of the entire mineral estate in the upland (which is the Osage Reservation), the Osages owned the mineral estate to the middle of the Arkansas. The state intervened as a defendant, alleging it owned the river bed in fee. The District Court for Western Oklahoma held that the Arkansas River was nonnavigable above its confluence with Grand River, that the Osages took title to the river bed from the Cherokees in 1872, and that the Osages were entitled to the relief prayed for. The Eighth Circuit held that "... whether the river was navigable or nonnavigable, the United States, as the owner of the territory through which the Arkansas flowed before statehood, had the right to dispose of the river bed, and had done so, to the Osages."¹⁰ On appeal, the Supreme Court affirmed the lower courts, although it reserved the question of whether Indian tribes could ever receive title to a navigable river bed by simply holding that the Arkansas River at this locus in quo was nonnavigable.

Almost half a century later, the Supreme Court was forced to decide the question reserved in *Brewer-Elliott*, in the case of *Choctaw Nation v. Oklahoma*.¹¹ Again the state of Oklahoma was leasing the Arkansas River for oil and gas; but this time it was below its confluence with Grand River. At this point, the Arkansas serves as the boundary line between the old Cherokee and Choctaw nations. The Cherokees sued in United States District Court for the Eastern District of Oklahoma to recover royalties from the leases and to prevent interference with its property rights. The Choctaws and

Chickasaws intervened as plaintiffs, claiming they also had property rights in the river bed. The district court entered judgment on the pleadings against plaintiffs, ruling that as a matter of law, the Indian tribes could have no legitimate claim to the bed of a navigable river and that title remained in the United States until Oklahoma's admission as a state, at which time it passed to Oklahoma. The Tenth Circuit affirmed.¹² The tribes then petitioned for a writ of certiorari to the Supreme Court, which was granted.¹³

The Court first examined the Indians' claims, noting that not only title to the minerals was involved, but also the ownership of dry land created by the narrowing and deepening of the channel by the Arkansas River Navigation Project. The Indians' case rested on the Treaties of Dancing Rabbit Creek (Choctaws, 1830),¹⁴ New Echota (Cherokees, 1835),¹⁵ and Doaksville (Chickasaws, 1837),¹⁶ which employed the words "up" or "down" the Arkansas. To the state's contention that a skilled draftsman would have employed more conclusive language if the United States had really intended to convey the title to the river bed of a navigable watercourse, the Court responded with six reasons to the contrary. First, there is a rule of construction that all doubts or ambiguities in Indian treaties should be resolved in favor of the Indians.

These treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arms-length transaction. Rather treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them. . . . and any doubtful expressions in them should be resolved in the Indians' favor. . . . Indeed the Treaty of Dancing Rabbit Creek itself provides that "in the construction of this Treaty, wherever well-founded doubt shall arise, it shall be construed most favorably toward the Choctaws."¹⁷

Second, there was a contemporaneous construction of the treaty language by President Tyler in the patent to the Cherokees in 1842: ". . . thence down the main channel of Arkansas River."¹⁸

Third, "Congress was accustomed to using the terms 'up' and 'down' the river when designating a navigable river as the boundary between States, . . . and when it did so, the boundary was set as the middle of the main channel."¹⁹ Since the Indian nations were considered sovereign entities, the Congress must have intended the words to have as much effect as if setting a boundary between the states.

Fourth, “the United States was competent to say the ‘north side’ or ‘bank’ of the Arkansas River when that was what it meant, as it had in the 1817 grant to the Cherokees in the Arkansas Territory.”²⁰ Congress knew how to avoid a transfer of rights to a river bed, and if it had so intended, it would have used appropriate language.

Fifth, if the United States had been intent on insuring that the Indians would have no legitimate claims to the river bed, it could have made an “express exclusion of the bed of the Arkansas River by the United States as there was to other land within the grants.”²¹ In fact, there seems little reason to believe such an exclusion was desired by either party.

As a practical matter, reservation of the river bed would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. . . . We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise. Nor do we believe that the United States would intend that it rather than petitioners have title to the dry bed left from avulsive changes of the river’s course, which as the District Court noted are common in this area. Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce.²²

Sixth, there is no legitimate basis to the state’s argument that the United States retained title in order to convey it to a future state, because each grant to the five tribes is accompanied by a promise that “no part of the land granted to them shall ever be embraced in any Territory or State.”²³

Choctaw Nation, then, established the fact that an Indian tribe could have an interest in a navigable river bed. And *Brewer-Elliott* established the fact that an Indian tribe could have an interest in a nonnavigable river bed where it owned the mineral estate of the upland. But what if a river is nonnavigable and the Indian tribe does not own the mineral estate to the upland? *Choctaw and Chickasaw Nations v. Seay*²⁴ involved the Red River, where no Indian tribes have reserved the mineral estate to the upland. The Choctaws and Chickasaws contended that because an act of Congress²⁵ authorized the Secretary of Interior to lease for oil and gas the remaining unallotted lands of each tribe, including “lands lying south of the medial line

of Red River to the south bank thereof," the tribes must necessarily have had an interest in the Red River. The Court held that once allotment occurred, no interest remained in the tribe; accordingly, once allotment was made of riparian land, the allottee owned the river bed (to the south bank, in the case of the Red; to the middle of the stream in most cases). The Court went on to say that if any tracts were unallotted on the Red River, of course the tribe would own the river bed to the south bank.

Application of Brewer-Elliott, Choctaw Nation, and Seay

Once it is established that the five tribes hold fee simple title to all lands which have not been allotted to individual members of each tribe or which have not been sold to individuals, it follows that all river beds of nonnavigable watercourses within the territory originally comprising the Choctaw, Cherokee, Chickasaw, Creek, and Seminole nations at the time of allotment, are owned by the particular tribe. As to navigable watercourses, the five tribes will probably be held to own their river beds as well, unless an express exclusion is made or unless the words of the treaty under which the tribe took the territory involved employ the phrase "along the bank" or "along the (north) (south) (east) (west) side of said river."

A more difficult problem is posed in regard to watercourses which constitute boundaries between tribes. While this remains an unsettled issue, a great deal has been clarified by a recent pronouncement from the United States District Court for the Eastern District of Oklahoma. Public Law 93-195, enacted by Congress on December 20, 1973, created jurisdiction in the Eastern District to hear the boundary dispute between the Cherokees and Choctaw-Chickasaws (the unresolved question of *Choctaw Nation*). A footnote in *Choctaw Nation* indicated that the Supreme Court would have preferred the boundary dispute to be resolved by dividing the Arkansas River in half.²⁰ The Supreme Court suggested that the words "up" or "down" a river had a definite meaning when Congress set boundaries between states—each state owned to the center—and there is no good reason not to apply that rule when determining the boundary between another type of sovereignty, two Indian nations. The three-judge panel which heard the boundary dispute was not unimpressed by this footnote.

It seems to us from a careful reading of *Choctaw v. Oklahoma*, that the Supreme Court by strong implications expressed its views as to title of the Arkansas River bed, and what is said is not mere suggestion, but amounts to a complete understanding that the

tribes, the Choctaws and Chickasaws on one hand and the Cherokees on the other, acquired the river bed in fee by reason of the large tracts of land granted them for their permanent home, free of white man's interference and without government reservation of navigable rivers.²⁷

The district court divided the Arkansas River down the middle as a boundary between the two tribes, finding nothing in the Treaty of Dancing Rabbit Creek (1830) with the Choctaws to suggest an intent by the United States to transfer more than the south half of the Arkansas River. This is so because the territory description begins "near Fort Smith, where the Arkansas boundary crossed the Arkansas River, running thence to the source of the Canadian fork. . . ." ²⁸ Fort Smith is on the south side of the Arkansas River. Article 1 of the Treaty of 1830 with the Choctaws provided that all treaties made with the Choctaws prior to the Treaty of 1830²⁹ were revoked to the extent inconsistent. The main argument by the Choctaw-Chickasaws was that the Treaty of Doak's Stand (1820)³⁰ with the Choctaws began at Point Remove, which is on the north side of the Arkansas River. However, the district court chose to rely on the revocation clause in Article 1 of the 1830 Treaty. Since *Choctaw Nation* decided that the Indians owned the entire river bed and since the district court ruled the Treaty of 1830 meant the Choctaws only owned the south half, by necessity the Cherokees owned the north half.

With these four river bed cases (*Brewer-Elliott*, *Choctaw Nation*, *Seay*, and *Choctaw Nation v. Cherokee Nation*) as a backdrop, several rules were suggested to resolve the claims of Indians in watercourses.

The general allotment Indians do not hold their tribal lands in fee as do the five tribes; instead, such tribal lands are of a different character.³¹

In dealing with the status of ceded lands, the basic question that constantly recurs is whether a cession of lands by an Indian tribe has finally and completely ended the interest of the tribe therein, or whether the tribe retains some equitable interest in the land conveyed. Prior to 1880, most of the treaties, agreements, and statutes by which Indian tribes ceded land to the United States provided for an outright and final conveyance, in return for which the Indians received cash payments, annuities, substitute lands, or other things of value.

For about four decades after the adoption of the General Allotment Act an alternative pattern prevails. "Surplus" reservation

lands not needed for allotment, are turned over to the government for the purpose of sale. The Indians are credited with the proceeds only as the land is sold, and the United States is not itself bound to purchase any part of the land so opened for disposal. *Undisposed of lands of this class remain tribal property until disposed of as provided by law.*³²

The author just quoted goes on to indicate that land having the status of "tribal property" gives the reservation Indians the possessory rights to the subsurface, absent an express exclusion from the document creating the particular Indian reservation.³³

Therefore, the same rules of construction that apply to the five tribes should apply to the general allotment Indians. Their claims to river beds crossing or adjoining the particular reservation are superior in all respects; of course, the claim is not one of fee, but rather as the holder of an equitable interest on the federal public domain.

A final note of caution: tribal lands of which disposition has been made, either to a tribal or nontribal member in fee, acquire the same status as riparian land anywhere else, *i.e.*, absent an express exclusion, the riparian owner owns to the middle of a nonnavigable watercourse and none of a navigable watercourse.

Conclusion

In determining the claims of the Indians of Oklahoma to the river beds, the following considerations should be made. First, treaties with the Indians are to be construed in their favor. Second, the fact that a particular watercourse is labeled "navigable" is not controlling so long as the Indians involved received their rights in the property prior to Oklahoma's admission as a state. Third, the language of the treaty placing the Indians on the particular tract controls. Fourth, the phrases, "up," "down," and "main channel" have specific meanings only in the context of treaty language of the bordering tribe. Fifth, "to and along the bank" clearly implies an intent that the tribe concerned receive no rights in the river bed. Sixth, the ownership in fee of land bordering a watercourse is not a requisite of a legitimate claim to the river bed. Finally, mineral ownership to the upland carries with it the mineral rights in the river bed.

NOTES

1. Act of Dec. 29, 1835, 7 Stat. 478 (Cherokees); Act of Feb. 14, 1833, 7 Stat. 417 (Creeks); Act of Sept. 27, 1830, 7 Stat. 333 (Choctaws); Act of Jan. 17, 1837, 11 Stat. 573 (Chickasaws); Act of May 9, 1832, 7 Stat. 423 (Seminoles).

2. Act of Mar. 21, 1866, 14 Stat. 755 (Seminoles); Act of Apr. 28, 1866, 14 Stat. 769 (Choctaws & Chickasaws); Act of June 14, 1866, 14 Stat. 785 (Creeks); Act of July 19, 1866, 14 Stat. 799 (Cherokees).

3. Act of July 1, 1902, 32 Stat. 716 (Cherokees); Act of June 28, 1898, 30 Stat. 495, 505-13 Choctaws & Chickasaws); Act of Mar. 1, 1901, 31 Stat. 861 (Creeks); Act of July 1, 1898, 30 Stat. 567, 568 (Seminoles).

4. Act of June 5, 1872, 17 Stat. 228.

5. Act of Feb. 8, 1887, 24 Stat. 388.

6. Act of Feb. 13, 1891, 26 Stat. 749.

7. Act of Mar. 2, 1889, 25 Stat. 1013.

8. F. COHEN, *FEDERAL INDIAN LAW* 334 (Albuquerque, 1971) [hereinafter cited as *FEDERAL INDIAN LAW*].

9. 260 U.S. 77 (1922).

10. *Id.* at 80.

11. 397 U.S. 620 (1970).

12. 402 F.2d 739 (1968).

13. 394 U.S. 972 (1969).

14. Act of Sept. 27, 1830, 7 Stat. 333.

15. Act of Dec. 29, 1835, 7 Stat. 478.

16. Act of Jan. 17, 1837, 11 Stat. 573.

17. 397 U.S. 620, 630-31 (1970).

18. *Id.* at 633.

19. *Id.* at 631 n.8.

20. *Id.* at 631. The grant in 1817 is 7 Stat. 158.

21. *Id.* at 634.

22. *Id.* at 634-35.

23. *Id.* at 635.

24. 235 F.2d 30 (10th Cir. 1956), *cert denied*, 352 U.S. 917 (1956).

25. Act of May 26, 1930, 46 Stat. 385.

26. 397 U.S. 620, 631 n.8 (1970).

27. This is from a copy of the original opinion which was most graciously supplied independently by counsel for both tribes, Earl Boyd Pierce for the Cherokees and Lon Kile for the Choctaw-Chickasaws. It is found at p. 24 of the original.

28. Act of Sept. 27, 1830, 7 Stat. 333 (Article 2).

29. Act of Sept. 27, 1830, 7 Stat. 333 (Article 1).

30. Act of Oct. 18, 1820, 7 Stat. 210.

31. The final difficulty with the five tribes is the status of claims of the Chickasaws in Choctaw watercourses, Choctaws in Chickasaw watercourses, Creeks in Seminole watercourses, and Seminoles in Creek watercourses. Without reading *Choctaw Nation*, it would seem that the rights of Chickasaws and Choctaws *in tribal land* were frozen in 1855, and that the rights of Seminoles and Creeks *in tribal land* were frozen in 1866. Yet the Chickasaws intervened as a plaintiff alongside the Choctaws, and no mention is made in *Choctaw Nation* and *Choctaw Nation v. Cherokee Nation* of any question as to the Chickasaws' standing, even though a map of the tribal domains in 1855 shows clearly that no part of the Chickasaw Nation borders the Arkansas River. (J. Morris & E. McReynolds, *Historical Atlas of Oklahoma*, map #23 (1965).)

32. *FEDERAL INDIAN LAW*, *supra* note 8, at 334 (emphasis added).

33. *Id.* at 312-13.